

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE DAILY WIRE, LLC, ET AL)
CASE NO. 6:23cv609
-vs-)
Tyler, Texas
UNITED STATES DEPARTMENT OF) 1:32 p.m.
STATE, ET AL April 23, 2024

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JEREMY D. KERNODLE,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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1 P R O C E E D I N G S

2 (CALL TO ORDER OF THE COURT.)

3 THE COURT: Thank you. Please be seated.

4 Okay. This is Civil Action 6:23cv609, The Daily
5 Wire vs. United States Department of State.

6 Let me take appearances beginning with Plaintiffs'
7 counsel.

8 MS. DOKUPIL: I'm Susanna Dokupil representing the
9 State of Texas.

10 THE COURT: Okay.

11 MS. DOKUPIL: And with me are Jacob Przada and
12 Munera Al-Fuhaid.

13 MS. LITTLE: And Margaret Little representing Daily
14 Wire and the Federalist. And with me today is Casey Norman.

15 THE COURT: Okay.

16 Okay.

17 MR. MODY: Arjun Mody from the Justice Department
18 representing Defendants, joined by my colleagues Dorothy
19 Canevari, Cristen Handley, and James Gillingham from the U.S.
20 Attorney's Office.

21 THE COURT: Okay. Well, I want to start with
22 primarily the Defendants' two motions, the motion to transfer
23 and the motion to dismiss.

24 So are you going to be arguing on behalf of the
25 Defendants, Mr. Mody?

1 MR. MODY: So I am prepared to address the
2 issues -- the standing and venue issues, so -- in the motion
3 to dismiss and motion for transfer.

4 THE COURT: Okay. Why don't you start there. And
5 one of the questions that I have is just the order of
6 proceedings. What do I need to decide first?

7 MR. MODY: Sure. Would you like me to --

8 THE COURT: If you would go to the podium.

9 MR. MODY: Certainly. So we think that it makes
10 most sense to start with jurisdiction. We think that the
11 Court should confirm its jurisdiction, so address the Article
12 III standing issues first before proceeding to venue,
13 deciding whether this is the correct forum. And then we
14 think that if the Court has jurisdiction and venue is proper
15 here, then we would proceed -- we would propose proceeding to
16 Plaintiffs' motions.

17 THE COURT: Okay.

18 MR. MODY: So -- happy to start with standing.

19 Congress tasked the State Department Global
20 Engagement Center with coordinating the Federal Government's
21 response to foreign disinformation aimed at harming U.S.
22 interests and U.S. allies abroad.

23 And based primarily on several events from years
24 ago, Plaintiffs have brought this lawsuit asserting that the
25 GEC is engaged in a wide-ranging enterprise to censor

1 American speech by -- we think there is a fundamental
2 disconnect between the specific allegations in the complaint
3 and Plaintiffs' rhetoric, meaning that the claims fail for
4 structural reasons. And I wanted to just emphasize two key
5 points with regard to standing to start.

6 The first is, this case is really about Plaintiffs'
7 concerns with products that private companies created and
8 then how other companies such as advertisers or social media
9 platforms use those products. But none of that is connected
10 to Defendants, and so we think there is a serious
11 traceability problem.

12 And the second reason that Plaintiffs lack standing
13 is related to timing.

14 The lawsuit focuses on events that took place many
15 years ago primarily, and we think this means that there is no
16 ongoing or imminent injury-in-fact as required for injunctive
17 relief, or that Plaintiffs have really identified any
18 specific ongoing conduct that this Court could enjoin that
19 would redress those injuries.

20 And we think these two issues -- that none of the
21 conduct here is connected to Defendants and the timing issues
22 play out slightly different ways with respect to Texas and
23 the Media Plaintiffs. But I guess we propose starting with
24 Texas.

25 We think that the facts there are more

1 straightforward and arguments about Texas's standing are also
2 relevant to the venue analysis because that is the basis for
3 venue that Plaintiffs alleged in the complaint.

4 So Texas's theory is that Texas has a state law, HB
5 20, that regulates content moderation decisions by social
6 media platforms, so it restricts the decisions that the
7 platforms can make with respect to whether to present certain
8 kinds of content on their websites or how to prioritize that
9 content.

10 And the complaint has a handful of allegations. I
11 think it is four or five paragraphs of the complaint that say
12 that Defendants' conduct is interfering with Texas
13 enforcement of HB 20 by inducing the platforms to violate HB
14 20.

15 And so we think that there are several problems
16 with this theory. The first is, just kind of as a logical
17 matter, I don't think Plaintiffs have explained what the
18 inducement is, whether there are sort of positive incentives
19 or negative incentives or coercion or anything like that that
20 is happening with respect to conduct that Defendants -- or
21 with respect to Defendants' conduct that is actually causing
22 the platforms to violate HB 20.

23 Most of the allegations in the complaint, again,
24 focus on these products. You know, NewsGuard and GDI are the
25 two primary companies that appear in the complaint. And

1 those products, you know, to the extent that they are used by
2 the social media platforms, the platforms can use those
3 products in whatever way they'd like. And to the extent that
4 a particular use of one of those products would violate HB
5 20, the platforms are free to use -- to not use the products
6 in that way.

7 THE COURT: But their allegations -- and we are
8 here on a motion to dismiss the pleading -- are that
9 Defendants have encouraged, have funded, have made all of
10 these technologies available and invited the social media
11 companies to use them. So what do you do about those
12 allegations?

13 MR. MODY: So a couple of responses to that,
14 Your Honor. I don't think that Plaintiffs have alleged that
15 the Defendants are actually asking the platforms to use these
16 products in any particular way.

17 And just to focus on what the actual two grants to
18 GDI and NewsGuard are -- and this gets into our sort of
19 factual attack on Plaintiffs' standing here, but none of the
20 conduct -- Defendants -- none of the conduct here is actually
21 related to the products that Plaintiffs claim in turn are
22 then used by other third parties to violate HB 20.

23 So, again, I guess there are two levels to our
24 argument.

25 First is that any violation of HB 20 depends on the

1 independent actions of third parties, and we think cases like
2 Lujan and Clapper sort of categorically say that where there
3 is that independent conduct, several chains and sort of a
4 causal link, that can't form the basis for Article III
5 standing. It is not traceable to anything Defendants have
6 done.

7 THE COURT: What if the Defendants have required
8 social media companies to use these technologies, would Texas
9 then be able to assert standing?

10 MR. MODY: So we think if there was a specific
11 allegation that the Defendants coerced a platform to use this
12 technology in a way that violated HB 20, we think that there
13 would be standing under those circumstances.

14 And I think one of the cases that Defendants cite
15 in their briefing is the Texas vs. EEOC case, which the Fifth
16 Circuit found standing based on a sovereign injury to the
17 State of Texas based on a federal regulation.

18 And, there, the regulation -- it was an EEOC
19 regulation -- or I believe it was guidance. The guidance at
20 issue in that case essentially required Texas to either
21 change its -- change its policies with respect to how it
22 hired employees as a state employer or they would be subject
23 to civil liability under the guidance.

24 And so we think, for instance, if the social media
25 platforms were exposed to civil liability, if they didn't use

1 the products in a way that violated HB 20, we think that
2 might show standing for Texas. We think that if there were
3 sort of strong, positive inducements to the platforms to use
4 these products in ways that clearly violated HB 20, I think
5 Texas might allege standing under those facts.

6 I think there is a separate issue here, which is
7 that Texas has not attempted to enforce HB 20 --

8 THE COURT: Well, stay on the other issue first.

9 MR. MODY: Sure. Sure.

10 THE COURT: So where would you draw that line?
11 Clearly, requiring social media companies to use the
12 technologies would create standing, and just notifying social
13 media companies that there are these technologies would not.
14 Okay?

15 MR. MODY: Correct.

16 THE COURT: But what about somewhere in between,
17 which is where I read the Plaintiffs' allegations is it was a
18 lot more than here are some technologies.

19 But here are some technologies. We invite you to
20 use them. We have tested them. Come try them out
21 yourselves. We have a State Department employee in Silicon
22 Valley to answer any questions. The world was on fire during
23 COVID. We need you to help us control misinformation and
24 disinformation.

25 Why does that not start to look more like a

1 requirement?

2 MR. MODY: So, again, I think even under those
3 facts, Your Honor, it is not a requirement that the platforms
4 are using the technologies in any particular way. I think we
5 think that even under Plaintiffs' allegation, which is that
6 there is inducement, there needs to be some sort of, let's
7 say, benefit that is inuring to the platforms or some sort of
8 negative consequence that would befall the platforms if they
9 didn't use the platforms -- they didn't use the products in a
10 particular way.

11 We also think that this lawsuit and with respect to
12 the GEC generally -- I appreciate that Your Honor referenced
13 the sort of more general issues around COVID and sort of
14 talking to the -- talking to the social media companies.
15 GEC's focus is on foreign disinformation overseas.

16 And so when you look at the actual grants, for
17 instance, that GEC gave to GDI and NewsGuard, those were
18 discrete grants that were in the context of, for instance,
19 for GDI it was for the purpose of GDI being able to expand
20 its language capabilities to East Asian languages or Eastern
21 European languages.

22 It was in the context of an international
23 technology challenge hosted in Paris where, you know, GDI's
24 technology -- you know, the State Department is essentially
25 saying GDI has a product, and our partners in Europe and our

1 partners in Asia, East Asia, or Southeast Asia can use those
2 products to counter Russian or Chinese disinformation.

3 And it's very similar for NewsGuard. The grant
4 that went to NewsGuard was for a -- for a -- excuse me -- for
5 a challenge that was hosted by the Department of Defense and
6 the State Department, and it was all geared towards Russian
7 and Chinese disinformation.

8 I wanted to address the point that you raised about
9 actually talking to the platforms because that is obviously
10 something that Plaintiffs do bring up in their complaint.

11 And, again, there are -- I mean, we don't read the
12 complaint to make any specific allegations about Defendants
13 sort of telling a platform that you have to use GDI or
14 NewsGuard or any other technology in this particular way, let
15 alone in a way that would actually violate a state law.

16 And so, you know, we don't -- we think we are very,
17 very far from the line in terms of is there specific conduct
18 that is alleged in the complaint whereby, you know, GEC or
19 the State Department is telling Facebook or some other social
20 media platform, here is a product, you should use it in this
21 way, and, you know, we know that this is going to interfere
22 with Texas's -- with HB 20.

23 THE COURT: Well, are you familiar with the Texas
24 vs. NRC? I think it is -- I don't know what NRC stands for
25 at the moment -- Nuclear Regulatory Commission, decided in

1 2023 -- I hated it when judges would ask about cases. I
2 don't think anybody has cited this one. So if you tell me
3 no, that is fine.

4 But this is a Fifth Circuit case where the federal
5 agency had issued a license permitting the storage of nuclear
6 waste in Texas, potentially in Texas, which would have
7 violated a Texas law, HB 7, which made it illegal to dispose
8 of or store high-level radioactive waste in Texas.

9 So the State of Texas sues, challenges the agency
10 issuance of these licenses before anybody had actually stored
11 any nuclear waste in Texas, from what I can tell from reading
12 the case.

13 And the Fifth Circuit says Texas can allege injury,
14 can allege standing because the agency's action is
15 encouraging others to violate state law.

16 MR. MODY: Uh-huh.

17 THE COURT: That seems pretty on point to what the
18 Plaintiffs have alleged here.

19 MR. MODY: So I am not -- as you have probably
20 noted, I am not familiar with that case. I guess it seems a
21 little bit like in that case, and, again, without having read
22 it or being familiar with the facts, that there might have
23 been some kind of incentive that was given to companies to
24 store their nuclear waste under those circumstances. I don't
25 know if the Federal Government was subsidizing it in some way

1 or the Federal Government was --

2 THE COURT: Well, none of those facts -- that may
3 be true, but none of those facts entered into the discussion
4 or the analysis by the Fifth Circuit.

5 Well, that is my question -- one of the questions I
6 have on Texas's standing. And if you want to look at the
7 case later, I am not going to make you stand there and
8 answer --

9 MR. MODY: Sure.

10 THE COURT: -- distinguish a case you have never
11 read. But I am happy to hear you later after you have had an
12 opportunity to review it.

13 MR. MODY: Understood, Your Honor.

14 I guess I just wanted to emphasize one more time
15 with respect to Texas's standing that, yeah, I mean, we think
16 that the kind of promotion -- what Plaintiffs are calling
17 promotion of these technologies or whatnot was really sort of
18 limited to the foreign context for GEC and for the State
19 Department. And so --

20 THE COURT: Well, that gets into the factual
21 attack.

22 MR. MODY: Right.

23 THE COURT: And I don't know what to do with that.
24 Because, you know, this is a 12(b) motion. There's not been
25 any discovery. They filed a complaint. And I interpret

1 their complaint to be alleging much more than just the
2 funding of technologies to censor foreign propaganda. It
3 went much further, according to Plaintiffs' allegations.

4 They may be completely wrong. And at summary
5 judgment you may come in, or trial, and introduce all sorts
6 of evidence to establish they are wrong, but at this stage
7 shouldn't I just be looking at the complaint and kind of put
8 off for another day all of the evidence that you've
9 submitted?

10 MR. MODY: Well, I think for -- I don't think the
11 Court needs to look at the factual attack, but, of course, to
12 the extent that you are inclined to disagree with us on the
13 facial challenge to Plaintiffs' standing, we think that there
14 is case law that supports that, you know, Defendants are
15 entitled to bring a factual challenge to jurisdiction, and
16 the Court can resolve even contested facts --

17 THE COURT: Well, I've been looking at those
18 cases --

19 MR. MODY: -- under the 12(b)(1) motion.

20 THE COURT: -- and, I mean, I understand that if
21 there is a dispute about an amount in controversy, for
22 example, or the citizenship of a party, that makes sense that
23 you would conduct a small summary judgment proceeding on that
24 disputed fact question. It doesn't make sense that you would
25 require the parties to stay in federal court when the Court

1 lacks jurisdiction, for months --

2 MR. MODY: Right.

3 THE COURT: -- only to disprove it later when it
4 could have been handled first.

5 But what you have done is challenged the truth of
6 virtually all of the allegations. And I don't know that I
7 have ever seen that before where a party -- a Defendant comes
8 in and says there is no standing because there is no injury
9 because none of this ever happened.

10 MR. MODY: Right.

11 THE COURT: Can you cite me a case where a court
12 has essentially allowed a defendant sort of a preliminary
13 summary judgment motion on the merits at this early stage?

14 MR. MODY: I mean, I think that I would just
15 distinguish between -- we are not claiming that the factual
16 attack is -- says that their claims are foreclosed on the
17 merits.

18 I mean, we think that Plaintiffs do bear the burden
19 of establishing Article III standing, and part of that is
20 alleging concrete injury.

21 And I think that the complaint has a handful of
22 specific allegations about these grants that went to
23 NewsGuard and GDI, but sort of I think more broadly the sort
24 of overall rhetoric of the complaint gets into allegations
25 that there is this much broader censorship scheme going on,

1 and I think that is how Plaintiffs are attempting to
2 establish their ongoing injury.

3 Because Plaintiffs agree that most of the specific
4 allegations of the complaint did -- do relate to conduct from
5 several years ago, and I think couldn't really be -- there is
6 nothing to enjoin, for instance, with respect to the grants,
7 there is nothing to enjoin with respect to the platform
8 Disinfo Cloud.

9 So I guess my reaction would be that part of that
10 is -- to just clarify some of that for the Court, and we
11 think that because standing here when they brought a
12 constitutional challenge, some of the facts are related to
13 the merits in some sense, but I guess concrete injury,
14 traceability, redressability we see those as core sort of
15 jurisdictional issues that Plaintiffs are required to plead,
16 understood that it is different --

17 THE COURT: I don't think they would disagree with
18 that.

19 MR. MODY: Yeah.

20 THE COURT: And I have had many cases where
21 Defendants challenged the allegations as failing to allege
22 injury, failing to allege redressability along the lines of
23 what you have done. But it doesn't get into the -- I mean,
24 we don't start looking at evidence at this stage. I mean, it
25 would be entirely unfair to require the Plaintiffs to counter

1 your affidavits that you have submitted when they haven't
2 even had any discovery, right?

3 MR. MODY: Your point is well taken, Your Honor. I
4 think we understand your position on this. We feel that the
5 declarations do go to jurisdictional issues that this Court
6 has the ability to resolve at this time.

7 And we also think that, to the extent, for
8 instance, that Plaintiffs have the burden to establish
9 concrete actual ongoing injuries to them, our position is
10 that those should be facts that are within their
11 position -- within their possession, and so we don't think --
12 we don't think that the fact that we have submitted
13 declarations necessarily means that Plaintiffs --

14 THE COURT: I mean, another alternative would be
15 allow the parties to engage in jurisdictional discovery,
16 which, as you have teed it up, would essentially be discovery
17 on the merits. I am assuming that is not what Defendants
18 would want at this point.

19 MR. MODY: No, that is not, Your Honor. I mean, we
20 think it makes most sense to just resolve the motion to
21 dismiss and motion to transfer first on the papers.

22 And, of course, if Your Honor is inclined to
23 disagree with us or deny both of those motions, then I think
24 we would just be past the Rule 12 stage at that point, and
25 then be going into sort of normal order of civil litigation.

1 THE COURT: Okay.

2 Did you want to address the issue with Texas having
3 not enforced the state law?

4 MR. MODY: Certainly, Your Honor. Thank you.

5 I think that is part of a piece with the rest of
6 our argument, but we think that that goes most directly to
7 injury-in-fact, that there is no sort of ongoing --
8 Plaintiffs -- or, excuse me, Texas hasn't alleged that they
9 have attempted to enforce HB 20 or are imminently going to
10 enforce HB 20. And so we think that that sort of means
11 facially that there is no injury-in-fact to Texas.

12 They also haven't alleged that there is any
13 particular platform that is currently violating HB 20. And
14 so, again, there is the separate traceability issue, but we
15 think that that means that there is no -- there is no ongoing
16 violation of HB 20 that Defendants are causing because, in
17 our view, there is no ongoing violation of HB 20 that Texas
18 has alleged.

19 THE COURT: Well, what about the EMTALA case that
20 Judge Hendrix had, I think it was Texas vs. Becerra?

21 MR. MODY: Uh-huh.

22 THE COURT: Are you familiar with that case? I
23 think it is discussed in the papers. This is the case where
24 Texas obviously has antiabortion statutes, federal agency
25 issues guidance that would require emergency room doctors to

1 perform abortions in Texas and everywhere under certain
2 emergency conditions.

3 MR. MODY: Right.

4 THE COURT: Texas challenges it using the same
5 theory that they have alleged here, that the agency's
6 guidance would harm the State's sovereign interest in the
7 enforcement of its own laws.

8 There is no allegation anywhere in the district
9 court opinion or statement that anybody had actually
10 confronted the situation that would have required Texas to
11 enforce its antiabortion statutes. But the district court
12 found that Texas had asserted an injury.

13 What is your response to that? That seems pretty
14 similar to this scenario.

15 MR. MODY: Yeah. I appreciate that, Your Honor. I
16 guess two responses.

17 One is that, to the extent that case law in that
18 case is not enjoined, then we think -- we think that creates
19 a sort of separate redressability problem here for Texas.
20 Because to the extent that a statute is enjoined, then it is
21 not going to be able to enforce the statute regardless of
22 what happens in this litigation.

23 But maybe the more important point is, again, there
24 it seems there was a direct conflict between the federal --
25 Texas was alleging that there was a direct conflict between

1 the federal law and the state law, and I guess we just don't
2 understand what the conflict would be between any of the
3 conduct that is alleged in the complaint and HB 20.

4 It sounds like they are -- private parties would be
5 forced to make a choice between -- or could be forced to make
6 a choice between --

7 THE COURT: Well, now you are going to back to the
8 first issue we talked about --

9 MR. MODY: Right. I think that sort of goes to the
10 first issue more perhaps --

11 THE COURT: Okay.

12 MR. MODY: Yeah.

13 THE COURT: What do you do with the fact that HB 20
14 has a private citizen enforcement mechanism? So even if the
15 State can't bring any kind of action to enforce it, the
16 citizens throughout Texas, as I understand it, can. They are
17 not enjoined from doing that. And that is the way the Texas
18 Legislature crafted the statute --

19 MR. MODY: Certainly.

20 THE COURT: -- it was enacted by the people, and
21 signed into law by the Governor. Why wouldn't that still be
22 affected by what -- at least what the Plaintiffs are claiming
23 that the Defendants are doing here?

24 MR. MODY: So, again, I am not sure how any of
25 Defendants' conduct is interfering with a private party's

1 ability to bring an enforcement suit. We haven't --
2 Plaintiffs haven't provided any examples of a Plaintiff
3 attempting to bring an enforcement suit.

4 THE COURT: Well, then what -- I don't think there
5 is anywhere in the case law that says that is the kind of
6 conflict that has to exist. I mean, as I understand it, if
7 the Defendants, if the State Department were requiring social
8 media companies --

9 MR. MODY: Understood.

10 THE COURT: -- to employ these technologies --

11 MR. MODY: Uh-huh.

12 THE COURT: -- they are requiring them to violate
13 state law, and the fact that the State of Texas can't bring
14 any kind of enforcement action at the moment doesn't prohibit
15 citizens from bringing those actions, as I understand the
16 state law. And why wouldn't Texas's sovereign interests in
17 the enforcement of its own laws still be an injury or harm
18 that they could allege here?

19 MR. MODY: Understood, Your Honor. So I guess my
20 response to that is very similar to my prior responses, which
21 is that the traceability issue that we discussed at the
22 outset and then I think with the private enforcement
23 provision and the transparency provision, which is something
24 that they have raised again, those were not -- those are not
25 in the complaint.

1 I think on the transparency provision, there is
2 sort of the separate point, which is that none of Defendants'
3 conduct -- I believe that provision requires platforms to
4 report, I think it might be once a year or twice a year, on
5 the decisions that they've made with respect to content on
6 their platforms. And I don't think any of the allegations or
7 any of the products that are discussed here would prevent a
8 social media platform --

9 THE COURT: Well, I have a question about that for
10 Plaintiffs when they get up.

11 MR. MODY: Understood.

12 THE COURT: Okay. Do you want to move on to --
13 anything else about Texas's standing that you want to
14 address?

15 MR. MODY: Unless, Your Honor has further
16 questions, I am happy to move to Media Plaintiffs' standing
17 or anywhere else.

18 THE COURT: Okay.

19 MR. MODY: Yeah.

20 So I think some of these points we have covered
21 with respect to Texas's standing, but I think, you know, with
22 respect to injury-in-fact, I just want to focus maybe on the
23 ongoing harm because that is I think a key point and
24 something that they have to allege both for the purposes of
25 injury-in-fact and also for redressability. There needs to

1 be some ongoing conduct that the Court could enjoin in terms
2 of standing.

3 And so, I mean, I think this gets into the timing
4 issues. The vast majority of the allegations in the
5 complaint were from years ago, and so even if -- setting
6 aside our factual attack, even if you were to accept that
7 there was some conduct that injured Plaintiffs in the past,
8 Plaintiffs haven't identified specific, ongoing conduct that
9 is harming them in a concrete way that could be enjoined.

10 Just to take the example of discussions with social
11 media platforms or what they call the Silicon Valley
12 initiative, I think, gee, our clients at the State Department
13 just sort of part of their mandate to understand the ways in
14 which technology is used by foreign actors to spread
15 disinformation, part of that -- part and parcel of that is
16 talking to private sector companies and understanding the way
17 that technology works and the way that they are maybe seeing
18 certain disinformation narratives kind of spread on their
19 platforms. Plaintiffs haven't identified -- haven't
20 identified examples of the State Department sort of telling
21 any platform to take down content --

22 THE COURT: But do they have to identify specific
23 examples? I mean, they have identified past examples, and
24 then they repeatedly say, you know -- and they have -- I
25 can't remember where it is, but there are allegations that

1 Defendants have said, you know, we are discontinuing Disinfo
2 Cloud but stay tuned for more. We are going to have further
3 platforms available.

4 MR. MODY: That's right, Your Honor.

5 THE COURT: Why isn't that enough? I mean, under
6 the federal rules they don't have to allege every single
7 current violation or future violation, right?

8 MR. MODY: Absolutely, Your Honor. I mean, we
9 still think that a statement from the State Department --
10 that statement I think was in 2022, tying that to a concrete
11 injury to The Daily Wire and FDRLST Media in 2024, we just
12 think that Article III requires more.

13 The requirement is that there needs to be an actual
14 concrete and particularized injury to them that is ongoing or
15 imminent. And we think a statement from Defendants from two
16 years ago that there is a platform that they no longer are
17 using but that stay tuned for another platform, and then
18 there is no allegation about what that platform is, what that
19 platform is used for, how that platform is injuring
20 Plaintiffs in 2024, and we just think that all of the
21 standard requirements for injury-in-fact are not met by
22 allegations.

23 I think that is actually a good example that, in
24 our view, of an allegation that Plaintiffs are attempting to
25 use to tie it to ongoing injury-in-fact but falls short of

1 the actual concrete, particularized requirements.

2 THE COURT: Okay.

3 MR. MODY: Yeah.

4 So I guess I would say the same thing about
5 allegations regarding the private sector engagement work.
6 Even if they don't have to identify that there was a
7 specific, for instance, action taken, there is no allegation
8 even that any of those conversations are about The Daily Wire
9 and FDRLST Media.

10 And to the extent, at least that is -- I don't see
11 that specific allegation in the complaint. And that, at the
12 very least, seems like it would be required to show some type
13 of particularized harm to them.

14 Again, they point to I think there are three
15 Twitter posts on the Disinfo Cloud Twitter. Those are
16 referenced in the complaint and also referenced in their
17 motion to dismiss opposition. Those are all from three or
18 four years ago. They are also on a Twitter account that is
19 inactive and that is not even controlled by the State
20 Department or GEC. The same is true for the Digest articles
21 that they point to.

22 So I think a lot of this -- a lot of Plaintiffs'
23 theory about ongoing injury to them is tied to a handful of
24 things that are sort of still on the Internet. Most of it is
25 on third-party websites. Couldn't really be enjoined --

1 THE COURT: Well, what is the GEC doing right now?
2 I mean, if they are not doing any of this, what is their
3 function? What are they doing on a daily basis? They are
4 still open for business, correct?

5 MR. MODY: Correct, Your Honor.

6 THE COURT: Okay.

7 MR. MODY: So, I mean, the GEC's mission is foreign
8 disinformation, and they are still hosting international tech
9 challenges. So I believe the recent one was in the Ivory
10 Coast or something like that.

11 They are still hosting tech challenges for
12 companies to, you know, show products and then how those
13 products can be used to counter foreign disinformation. I
14 think there is a lot of, for instance, Russian disinformation
15 that is being spread in Europe related to the war in Ukraine.
16 That is a key focus of the GEC. There is still a lot of --

17 THE COURT: And what do they do to ensure that that
18 stuff doesn't filter back and censor Americans?

19 MR. MODY: So, I mean, their focus is all on -- a
20 couple of responses, Your Honor, and I am probably not going
21 to be able to explain the exact technology in terms of how --

22 THE COURT: I probably wouldn't understand it
23 anyway.

24 MR. MODY: -- they do this.

25 But, you know, our understanding is GEC has kind of

1 mechanisms for identifying whether, you know, someone is a
2 non-U.S. person in terms of a Twitter account or something
3 like that.

4 GEC also does more just sort of straightforward
5 things, such as they might publish a report in a foreign
6 language that is clearly targeted at -- you know, they might
7 publish a report in an Eastern European language or in French
8 or something like that.

9 And that is clearly just targeted at places in
10 Europe, places overseas, and countering narratives that are
11 being pushed by adversaries.

12 And so I think there is just a lot of checks and
13 balances in terms of what GEC --

14 THE COURT: But when they are funding tech
15 challenges to invite private entities and people to create
16 tools to counter foreign propaganda, how do they ensure that
17 that is not used in the United States to censor Americans and
18 the press?

19 MR. MODY: So, I mean, I am not sure I am prepared
20 to give a much more fulsome answer to that question. I think
21 we have obviously been focused on the allegations in this
22 specific case and -- I mean, with respect to Media Plaintiffs
23 and with respect to The Daily Wire and Federalist, so I think
24 I am not going to be able to give a more fulsome answer to
25 that question.

1 THE COURT: Okay.

2 MR. MODY: But, yeah.

3 So just moving from injury-in-fact to traceability
4 for a minute, and I just want to focus on the facial attack.

5 Again, we think this is all kind of about private
6 conduct. This is all about Plaintiffs' concerns about how
7 GDI and NewsGuard, which have described The Federalist and
8 Daily Wire in contexts that are separate from the Defendants
9 and then kind of market those products to other companies.

10 I think one point I wanted to emphasize that gets a
11 little bit lost in the briefing perhaps is that Plaintiffs
12 describe a lot of these tools and technologies as censorship
13 tools and technologies, but the declarations from -- from --
14 I guess the products are not censorship technologies, and
15 they don't -- you know, NewsGuard, GDI, and similar
16 companies, they don't have the power to kind of censor or
17 blacklist entities. They create products that -- that --
18 essentially, their opinions of the credibility of news
19 organizations, and according to kind of free market
20 principles, other advertisers or platforms or whatnot are
21 free to adopt those policies.

22 I think with respect to NewsGuard and Plaintiffs
23 focus a lot on the -- their ratings of -- their ratings
24 product essentially, the nutrition labels of products.

25 If you are a -- if you are just a normal Internet

1 user, such as yourself or myself, and we were to install
2 this, it would just provide a little box that provides more
3 content in our browser. And then as a reader, you are sort
4 of free to interpret that however you would like.

5 And we think that this is like -- we think this is
6 an alternative essentially to censorship, or that is how
7 NewsGuard and GDI have described their products.

8 THE COURT: But you don't think the State
9 Department or the Federal Government could create that kind
10 of technology and target domestic speech, do you, American
11 media companies? And, you know, require social media
12 companies to provide these sort of explanations for certain
13 speech. You are not making that argument, are you?

14 MR. MODY: We are not making the argument that the
15 State Department has the power to compel the platforms to,
16 you know, say certain things --

17 THE COURT: Well, I don't mean the power to. I
18 mean, assuming there is --

19 MR. MODY: Consistent with the --

20 THE COURT: Yeah, consistent the First Amendment.
21 Okay.

22 MR. MODY: Yeah. But we also don't think that's
23 necessarily what this case is about. Because, again, just
24 focusing on Daily Wire and Federalist, you know, we don't
25 think there is an allegation in this case that the Defendants

1 are compelling anyone to speak, at least I don't think there
2 is a compelled speech argument that Plaintiffs have made
3 here.

4 THE COURT: Okay.

5 MR. MODY: Unless Your Honor has more questions
6 about traceability, I am happy to do redressability quickly.

7 THE COURT: Okay.

8 MR. MODY: I think this is -- I think I have sort
9 of said some of this already, but we think the kind of
10 breadth of the injunctive relief that Plaintiffs are seeking
11 here is kind of indicative of the fact that they haven't
12 identified specific actions that would be enjoined or
13 specific conduct that would be enjoined that would redress
14 their injuries. And so I just wanted to -- yeah, I just
15 wanted to say that before --

16 THE COURT: Okay.

17 MR. MODY: -- kind of closing on standing.

18 THE COURT: Do you want to talk about the APA
19 claim?

20 MR. MODY: Sure, Your Honor, I'm happy to address
21 the APA claim.

22 I mean, in the Fifth Circuit, identifying a final
23 agency action is a jurisdictional requirement for the APA
24 claim. And, you know, Plaintiffs haven't identified a
25 discrete final agency action.

1 In the complaint, their identification of the final
2 agency action is essentially a broad, secretive scheme that
3 they say needs to be enjoined, and we think that just doesn't
4 meet the discrete final agency action requirement under the
5 APA.

6 THE COURT: Are you aware of any cases -- maybe you
7 have cited them -- where courts have decided this question at
8 the motion to dismiss stage, or would it be better to decide
9 it later?

10 MR. MODY: I mean, we -- I am not sure if the Lujan
11 vs. the Defend -- it is not Defenders of Wildlife -- the
12 National Wildlife case is -- I'm not sure if that is a motion
13 to dismiss stage, Your Honor, but we think that is part of
14 their pleading requirement to establish jurisdiction.

15 THE COURT: Okay.

16 MR. MODY: Well, unless you have a specific
17 question about the APA claim --

18 THE COURT: That was it.

19 MR. MODY: Okay. Thank you, Your Honor.

20 Any other questions about standing, or would it be
21 better if I moved to venue?

22 THE COURT: You can move to venue.

23 MR. MODY: Okay. Just briefly, Your Honor. I
24 think there are two parts to -- two main parts to our venue
25 argument.

1 The first is that, in our view, because Texas lacks
2 standing, then you can't be premised on Texas's presence in
3 this lawsuit, and the complaint -- the basis for venue that
4 is pled in the complaint, I think it is paragraph 9, is
5 focused on Texas.

6 In their -- I think in their briefing and their
7 opposition, Plaintiffs have raised the sort of second basis
8 for venue, which is whether a substantial number of events
9 that led to -- that gave rise to the claims occurred in this
10 district.

11 We don't think that is well pled. It is not in the
12 complaint. But even if -- even if Your Honor looks at that,
13 we don't think -- we don't think they meet that standard
14 because none of Defendants' conduct took place in this
15 district, and Media Plaintiffs don't reside in this district
16 and are not sort of present in this district --

17 THE COURT: But if I find that Texas has standing,
18 are you still arguing that Texas can't sue in the Eastern
19 District of Texas?

20 MR. MODY: We have made that Honor Your -- we have
21 made that argument, Your Honor. We are certainly aware that
22 the weight of authority in the Fifth Circuit cuts against us
23 on that argument. But we would say that that is a separate
24 basis for denying venue even if Texas has standing.

25 THE COURT: Okay.

1 MR. MODY: And so just in terms of the substantial
2 part of the events prong, we think that the focus needs to be
3 on where Defendants' conduct occurred.

4 And we are aware that there are some cases that
5 look to the burdens on the parties, but we think those cases
6 focus primarily on the burden -- the burden to parties that
7 are actually present to -- present in the district.

8 We think the Career Colleges case is pretty
9 instructive on this point, and Media Plaintiffs are just not
10 present in the district in a way that those cases recognize
11 as being sufficient to establish that a substantial party
12 event has, in fact, occurred here.

13 THE COURT: Okay.

14 Okay. Let me hear from Plaintiffs' counsel on
15 those issues, and then we will talk about the motion for
16 expedited discovery.

17 MR. MODY: Thank you, Your Honor.

18 MS. DOKUPIL: Well, I would actually like to start
19 with venue.

20 THE COURT: Do you think it is appropriate for me
21 to start with venue when they have challenged standing for
22 one of the key parties?

23 MS. DOKUPIL: Absolutely I think venue comes first.
24 This is based on the Seariver Maritime vs. Pena case in the
25 Southern District of Texas.

1 And in that court it says that the Section 1391(e),
2 which is relevant here, makes no mention of standing, and
3 there is no case construing Section 1391(e) in which standing
4 was taken into consideration. Plaintiffs' arguments on
5 standing are not probative on the venue issue. And if
6 plaintiffs' claims raise a genuine issue of standing, the
7 question must be addressed by a court with proper venue.

8 So that says to me that venue comes first, and then
9 we look at standing once we are in a court of proper venue.

10 I think there might be a hypothetical scenario if
11 venue were found to be proper and then none of the Plaintiffs
12 had standing, and then obviously the case would be dismissed.

13 But, especially, if you are going into a factual
14 attack on jurisdiction where there is really going to be
15 quite a debate about standing, it really does seem that
16 should be in a court of proper venue.

17 And it is Texas's position, as Your Honor pointed
18 out earlier, that we can sue anywhere within our borders.
19 That is what the great weight of authority that has addressed
20 the question says.

21 And this is a case arising under 1391(e)(1) against
22 an officer or employee of the United States, and this is --
23 under part (c) it is -- it's -- venue is proper where the
24 Plaintiff resides if no real property is involved in the
25 action.

1 It has been the law for nearly 130 years that a
2 state resides within any point within its borders.

3 Defendants point out in their brief that the cases
4 that we cite rely on the, quote, flawed reasoning of
5 California vs. Azar, but that is, in fact, a rejection of the
6 exact argument that they have raised here, that 1391(c)(2)
7 controls and a state is an entity that can sue and be sued
8 and is limited to its principal place of business, which is
9 its capital.

10 But the great weight of authority goes very
11 strongly against that. And, in fact, Defendants' argument
12 has been rejected twice by Texas Federal Courts in the last
13 year.

14 In Texas vs. Department of Homeland Security, they
15 said: Consistent with what the Fifth Circuit and every other
16 federal court to have addressed this issue have held, Texas
17 resides at every point within the boundaries of the state,
18 including the Victoria Division.

19 The Northern District of Texas reached pretty much
20 the same conclusion in Texas vs. Garland. Same argument.
21 And the court said: By its plain terms, Section 1391(c)(2)
22 refers to corporations and unincorporated associations, not
23 sovereign states.

24 So Texas feels like its claim to venue is quite
25 strong and consistent with the great weight of authority for

1 over 100 years.

2 THE COURT: Okay.

3 MS. DOKUPIL: Okay. To that end, if Texas is --
4 has venue at any point within its borders, including the
5 Eastern District, then Media Plaintiffs can also bring their
6 claims under the doctrine of pendent venue, which is very
7 similar to pendent jurisdiction.

8 It simply means that when you have claims that
9 arise under a common nucleus of operative fact, that the
10 venue can reach those other claims.

11 So if Your Honor doesn't have any further questions
12 on venue, I'd like to move on to standing.

13 THE COURT: You may.

14 MS. DOKUPIL: Great.

15 So let's start with the facial challenge to
16 standing. And that is the only type of challenge that is
17 raised in the motion to transfer venue. The factual attack
18 isn't raised until the motion to dismiss.

19 So on facial challenge, all Texas's allegations
20 should be taken as true for the purposes of standing and
21 venue. And Texas has properly pled standing because it has
22 pled an injury to its sovereign interest in creating and
23 enforcing its laws that was caused by the Defendants and can
24 be addressed by injunctive relief.

25 Regarding injury-in-fact. The Fifth Circuit has

1 held that states have a sovereign interest in the power to
2 enforce and create the legal code. And pursuant to that
3 interest, states may have standing based on federal
4 assertions of authority to regulate matters they believe they
5 control, federal preemption of state law, and federal
6 interference with the enforcement of state law, at least
7 where the state statute at issue regulates behavior or
8 provides for the administration of state programs. And that
9 is exactly what we have here in HB 20.

10 And in order to plead standing, Texas only needs to
11 establish a substantial risk of an identifiable trifle of
12 injury to demonstrate standing. And to this end, this
13 answers the question that was brought up earlier about, does
14 Texas actually have to demonstrate that any enforcement has
15 been tried and failed?

16 And I would say no because that would be
17 inconsistent with only having to demonstrate a substantial
18 risk of an identifiable trifle.

19 What Texas has to show is that the risk of injury
20 is out there to its enforcement of its code.

21 And, also, the Supreme Court in *Biden vs. Nebraska*
22 has held that an agency action harms the state's performance
23 of its public function, and that is necessarily a direct
24 injury.

25 This is a case where the Department of Education's

1 loan forgiveness was challenged in the Supreme Court, and the
2 state was determined to have standing to challenge that.
3 Because when a federal law interferes with a state's exercise
4 of its sovereign power to create and enforce legal code, it
5 inflicts on the state the requisite injury-in-fact.

6 THE COURT: And what was the state law in that
7 case?

8 MS. DOKUPIL: This was MOHELA. This was the
9 Missouri plan to run a loan program. And so they were
10 fiscally harmed by the loan forgiveness program because they
11 could no longer collect the interest on the loans that they
12 had out.

13 So HB 20's stated purpose is to protect the free
14 exchange of ideas and information. It is right in Section 1.
15 And so any federal policy or agency action that aims to
16 restrict that free exchange of information conflicts with the
17 purpose of the law and with Texas's sovereign interests.

18 The complaint enumerates several areas in which the
19 conduct of Defendants does implicate HB 20.

20 Now, at this point I'm going to say as though -- as
21 though HB 20 -- I am going to speak of it in its entirety and
22 then address the fact that it is currently enjoined in part.

23 So in its entirety, HB 20 requires certain media
24 platforms to disclose how they curate and promote content to
25 users, moderate content, use algorithms so that users can

1 make informed decisions.

2 It also requires a biannual transparency report
3 that includes how often the platform was alerted to illegal
4 or policy violating conduct by users either by employees or
5 automatic detection tools, and it also requires a biannual
6 transparency report that includes the actions taken to like
7 remove, demonetize, or deprioritize content or add a warning
8 to certain content.

9 It allows the Attorney General to bring a lawsuit
10 to enforce HB 20, and it prohibits the censorship of content
11 based on the viewpoint expressed or represented or the fact
12 that the user is within the State of Texas.

13 So these are all things that are on a collision
14 course with what we have alleged if facts are taken -- if the
15 allegations are taken as true, the State Department's effort
16 to censor different voices on a social media platform based
17 on their viewpoint or based on the fact that in the eye of
18 the people encouraging the censorship tools, it's
19 disinformation.

20 THE COURT: Is the only provision that is enjoined,
21 or stayed I guess, the enforcement of which is stayed is the
22 AG's ability to bring an enforcement action?

23 MS. DOKUPIL: No, it is a bit broader than that.

24 So the history of HB 20, first the district court
25 enjoined it, and then the Fifth Circuit overturned the

1 district court's injunction, but then they went ahead and
2 stayed the Fifth Circuit's mandate pending the appeal to the
3 Supreme Court.

4 But the only part that is up before the Supreme
5 Court is the ideas raised in the Solicitor General's
6 questions presented. And those questions presented are only
7 two, whether the law's content moderation restrictions comply
8 with the First Amendment, and whether the law's
9 individualized explanation requirements comply with the First
10 Amendment.

11 So the whole statute is not exactly on the chopping
12 block at the Supreme Court.

13 The statute also has a very robust severability
14 provision. So we think that, at a minimum, the transparency
15 requirements do not seem to be directly implicated by the
16 questions presented, and so those are likely to not
17 be -- they are not likely to be brought into the First
18 Amendment arguments. And, at a maximum, the Supreme Court
19 may uphold the various parts that are currently up being
20 challenged.

21 So we think it is entirely premature to overturn
22 the strong presumption of constitutionality that attaches to
23 statutes on the speculation that the Supreme Court might
24 overturn the statute. It is Texas's position that this law
25 is presumed constitutional until the Supreme Court says

1 otherwise.

2 THE COURT: Well, and, here, the Fifth Circuit has
3 already upheld its constitutionality.

4 MS. DOKUPIL: Also that.

5 THE COURT: What is your argument -- I didn't
6 understand the argument that the Defendants' conduct, as
7 alleged in the complaint, affects the ability of Texas to
8 enforce the transparency provision.

9 MS. DOKUPIL: There are a couple of different
10 points on that.

11 Well, first of all, if the -- so if the Defendants
12 are -- if the Defendants, as alleged, are censoring
13 technologies, I can see your point that, well, it seems that
14 the media platforms could just go ahead and comply with HB
15 20.

16 And yet I think this is a significant risk that it
17 might be difficult for them to do so. They may not feel like
18 they want to let everybody know what they are doing. They
19 may be strongly suggestive that it is not a thing -- but this
20 is something that I would have to explore further with
21 discovery because we do not have the evidence on that right
22 now.

23 Right now we are just saying on information and
24 belief as an allegation in a complaint that we think that
25 there could be issues.

1 THE COURT: I wondered whether it was that the
2 social media platforms don't necessarily know or understand
3 the extent of the State Department's involvement in the
4 development of these technologies, and that might be a reason
5 why they can't comply with the transparency provision. Is
6 that an allegation that you make in the complaint?

7 MS. DOKUPIL: Not directly, although that is
8 something that I would explore further in discovery. The
9 allegation that we do make in the complaint is that -- and
10 this is to the traceability point, that the Government action
11 can lead to third-party actions like -- Department of
12 Commerce v. New York makes this point, that traceability can
13 be based on -- the Government actions have a predictable
14 effect on the independent actions of third parties.

15 And to this point, I think the Missouri vs. Biden
16 case is very instructive. That is a Fifth Circuit case from
17 last year. And while it is up for review before the Supreme
18 Court right now, even just the statement of the case is very
19 instructive on this point.

20 Because in that case it details how a number of
21 departments of the Federal Government, including the White
22 House, the Surgeon General, the CDC, the FBI were engaged in
23 very specific detailed emails with people at social media
24 companies telling them, hey, why didn't you deprioritize this
25 thing that you know that is disinformation? And the

1 statement of the case shows how the employees or executives
2 at the social media companies were -- basically could not
3 comply fast enough.

4 They were very capitulatory, and I think that --
5 that is more of the situation that I think could surface here
6 with further discovery is that the Government is the
7 Government. The Government doesn't need to wield a big stick
8 to get things done.

9 The Government really all they need to say is, you
10 know, we'd like it better if you did it this other way. And
11 Missouri vs. Biden shows us that that is all they had to say.
12 They didn't need to offer a benefit or a consequence. They
13 just had to nudge.

14 THE COURT: Mr. Mody said that there is not an
15 allegation in the complaint that any of the social media
16 platforms have violated HB 20.

17 Is that true, or would you take issue with that?

18 MS. DOKUPIL: I would say that we -- any type of
19 censorship that restricts the free exchange of viewpoints and
20 ideas, which is the purpose of HB 20, would be a violation of
21 HB 20.

22 I would point out, although my colleague
23 representing Media Plaintiffs will have more specifics, but
24 there are definitely some very strong statements that have
25 been made about it.

1 There is -- Alexis Frisbie at the State Department
2 gave a talk about how the GEC is bridging the gap between
3 foreign information and domestic information, that there is
4 an embedded person in Silicon Valley, and people at GEC are
5 really happy to talk to private companies about the tools
6 they have for combating information.

7 So I think there are definitely strong hints that
8 HB 20 has been violated, but we would need discovery to get
9 strong evidence.

10 THE COURT: Okay.

11 MS. DOKUPIL: Okay.

12 So we have been talking a bit about traceability
13 and causation. I would like to point out further on that,
14 that traceability doesn't require a showing of proximate
15 cause or that the Defendants' actions are literally the last
16 step in the chain of causation.

17 All we have to show really is that the Government
18 action created a predictable effect on the decisions of third
19 parties.

20 We -- and we feel like social media companies may
21 not really feel free to disregard censorship tools when the
22 Government suggests strongly to them that they should use
23 them.

24 On redressability, closely related, a Plaintiff has
25 shown redressability if the desired relief would lessen the

1 injury. It doesn't have to be a complete cure.

2 And so in this case if the individual Plaintiff
3 censorship can also be traced -- I'm sorry, not the
4 individual Plaintiffs, but the -- if people who would be
5 protected by HB 20 are harmed by Government-coerced
6 enforcement of content moderation policies, then that
7 infringes on the State's interests, and stopping that
8 Government conduct would redress Texas's injury.

9 If Your Honor has no more questions on facial
10 challenge, I will move on to factual challenge.

11 THE COURT: Okay. You may.

12 MS. DOKUPIL: Okay.

13 THE COURT: Well, what is your position on whether
14 the Court should at this point engage in that analysis?

15 MS. DOKUPIL: A couple of points on that. If the
16 Court -- let me do this in reverse. I don't believe that the
17 Court should engage in the analysis at all because the
18 factual attack is not really a factual attack, it is an
19 indirect attack on the merits.

20 However, if it were a proper factual attack, it is
21 not on a minor point, such as Your Honor mentioned earlier
22 like in the amount in controversy or diversity of
23 citizenship.

24 And in which case when it is not on a minor point,
25 at a minimum, we should have jurisdictional discovery before

1 we have a final ruling from the Court on a significant matter
2 in the case.

3 THE COURT: Okay.

4 MS. DOKUPIL: In a factual attack, the Defendants
5 present evidence that counters facts relevant to the
6 Plaintiffs' standing, and Plaintiffs are supposed to counter
7 that evidence by a preponderance of their own evidence.

8 But in a situation like we have here, there is
9 asymmetric information. Most of the information lies with
10 the Government Defendants, which makes it very hard for us to
11 come up with affidavits that counter their affidavits without
12 jurisdictional discovery.

13 That said, it is our position that, in fact, this
14 is exactly the type of factual attack that goes to the heart
15 of the merits of the claim.

16 And the Fifth Circuit has said in Williamson vs.
17 Tucker that when you have jurisdictional facts that are
18 central to the merits of the dispute, going ahead and
19 resolving them as jurisdictional facts essentially deprives
20 the Plaintiffs of the protections provided by Rule 12(b)(6)
21 and Rule 56.

22 Because in a Rule 12(b)(6), it is a failure to
23 state a claim based on a facial challenge, and Rule 56 is the
24 proper venue for if you have a substantive issue in the case
25 that is a disputed issue of material fact.

1 And that is basically what we have here. We
2 disagree as to whether or not Defendants are engaged in the
3 censorship of American media companies. That is the heart of
4 the case. That cannot be factual --

5 THE COURT: Did y'all cite any cases where the
6 facts were similar to this situation? I mean, I was reading
7 I think Pickett and the other cases that talk about where
8 jurisdiction is intertwined with the merits. It seems like
9 those cases involved whether the statutory claim that gave
10 the Court jurisdiction and also would give the Plaintiffs the
11 relief was triggered in that particular case or not.

12 Here, it is -- I mean, as I was saying to Mr. Mody,
13 it is even more fundamental. The issue is whether Plaintiffs
14 did -- or Defendants did what Plaintiffs are alleging they
15 did or not.

16 MS. DOKUPIL: Right.

17 THE COURT: But I haven't seen a case, preferably
18 from the Fifth Circuit, that pretty squarely and clearly says
19 that is inappropriate to resolve at this stage.

20 MS. DOKUPIL: I think --

21 THE COURT: It seems like it would be the logical
22 inference from the other cases, but I just haven't seen
23 anything on point.

24 MS. DOKUPIL: I think Williamson is the closest,
25 and that is a case where the whole federal jurisdiction was

1 determined as to how a certain type of security was
2 classified, and the Williamson case has the longest
3 discussion of exactly how and when to apply a factual attack
4 and what it is good for and what it isn't.

5 The court -- and even in that case, though, it is
6 still more hived off than it is in our case, even though it
7 is fairly fundamental to the case and it involved -- if the
8 idea of a certain security was defined one way, then it was a
9 matter of state law, and there was no federal question
10 jurisdiction. And if it was defined the other way, then it
11 was a federal question, you know.

12 And the Court has a very lengthy analysis of how it
13 would resolve it either way, and, you know, it ends up
14 talking about it --

15 THE COURT: And ultimately says that it is
16 inappropriate to resolve that now; is that what you are
17 saying?

18 MS. DOKUPIL: It partly did and partly didn't.
19 It's a halfway-in-between result. But the language that it
20 frames it with is very strongly in favor of, if this is an
21 indirect attack on the merits, we are not doing it.

22 So, ultimately, I think they found the definition
23 of the security had enough procedural to it that they need to
24 talk about it. But it is not as clear-cut as you might
25 like.

1 THE COURT: Okay.

2 MS. DOKUPIL: Okay.

3 THE COURT: I am used to that.

4 MS. DOKUPIL: Yeah.

5 So we would argue that basically when you distill
6 Defendants' attacks on standing into a few points, they are
7 all right squarely within the merits.

8 For example, Defendants didn't engage in any
9 censorship of American media, so nobody is injured. Well,
10 that would be right at the heart of the First Amendment
11 claim. Did you engage in censorship or not? This is not a
12 jurisdictional claim; this is a merits claim.

13 Or even if Plaintiffs were injured, it was due to
14 the independent actions of third parties. Well, this right,
15 again, goes to the merits or whether or not Defendants
16 engaged in censorship and they induced or influenced or
17 coerced third parties to do what they wanted them to do.

18 You know, even: Does Defendants' conduct interfere
19 with HB 20? Right again. Did they engage in censorship or
20 not? Right at the heart of the case.

21 Even -- you know, Media Plaintiffs' injury was only
22 in the past. Once again, are they engaging in ongoing
23 censorship?

24 So any way you look at it, it is pretty squarely at
25 the center of the heart of the case, did they or are they or

1 will they continue to be engaging in censorship of American
2 media? And so for that reason, it doesn't seem that it is
3 right for -- or proper to have a jurisdictional argument
4 about it.

5 THE COURT: Okay.

6 MS. DOKUPIL: And with regard to Texas
7 specifically, Texas's -- considering that Texas only has to
8 demonstrate a substantial risk of an identifiable trifle of
9 injury at this stage of the litigation, it is still even a
10 low bar. And even considering Defendants' attack is factual,
11 Texas should still meet it.

12 And if this Court thinks that Texas has not met its
13 burden to survive a factual attack, then Texas would ask for
14 an opportunity for jurisdictional discovery.

15 If Your Honor has no more questions on standing, I
16 can move on to a couple of points about the APA claims.

17 THE COURT: Okay.

18 MS. DOKUPIL: All right.

19 So there are two different APA claims in this
20 complaint. One is a final agency action claim and one is a
21 non-statutory cause of action.

22 Defendants, as you have heard, argue that there is
23 no final agency action, and so the Court doesn't have any
24 jurisdiction to hear the APA claims. But this is an argument
25 that is only relevant to the final agency action claim.

1 There is a very nice roadmap in the case of Apter
2 vs. Department of Health and Human Services. And this is a
3 Fifth Circuit case decided last year in 2003 -- '23.

4 And after the Court was presented, like here, with
5 three different claims, a final agency action, a non-final
6 agency action, performed ultra vires, and a common-law ultra
7 vires claim. And that case was dealing with FDA posts about
8 off-label uses of ivermectin, such as: Stop it. You are not
9 a horse.

10 And this case had -- it turned out that the FDA
11 post had consequences for doctors with their state licensing
12 boards and positions with hospitals who expressed a different
13 view about ivermectin.

14 And what happened was that the Apter court
15 determined that the Plaintiffs had presented an ultra vires
16 non-statutory cause of action under the APA, similar to the
17 one that Plaintiffs bring here. And because they found a
18 waiver of sovereign immunity on jurisdiction based on that
19 one, they didn't really address the other two.

20 But in order to present a non-statutory cause of
21 action under the APA, the Plaintiff needs to show that some
22 agency action affected him in a specific way, and it doesn't
23 have to be a final agency action.

24 You just have to show that the Plaintiff was
25 adversely affected or aggrieved by the action, and in so

1 doing, the Plaintiff has to show that his injury falls within
2 the zone of interest sought to be protected by the provision
3 that forms the legal basis for his complaint.

4 So, here, Plaintiffs have raised such an agency
5 action. They have alleged that they are aggrieved. And the
6 zone of interest is provided by the -- two different
7 provisions.

8 One is that the State Department should stick to
9 foreign policy, and the other one is the Antideficiency Act,
10 which basically says that an agency may only spend what has
11 been authorized by Congress and according to Congressional
12 guidelines. You know, Plaintiffs are alleging here that both
13 of those have been violated.

14 THE COURT: What is your answer to the question I
15 raised to Mr. Mody about when is it appropriate for a court
16 to consider whether the plaintiffs have identified final
17 agency action? Should we wait for summary judgment, or is it
18 appropriate at the motion to dismiss stage?

19 MS. DOKUPIL: Well, it is a bit unclear from the
20 pleadings, but one way it could come up at this stage is if
21 the Defendants were saying that sovereign immunity had not
22 been waived. In that case, then you would have to address it
23 under 12(b)(1). But I don't think that sovereign immunity
24 was quite squarely presented in the arguments here, so that
25 does make it more complicated.

1 THE COURT: And just so I understand, you all are
2 raising alternative claims? It is either final agency
3 action, or it is not, but either way you can bring a claim?

4 MS. DOKUPIL: In this case, yes, I think that an
5 action would be final or not final.

6 THE COURT: Okay.

7 MS. DOKUPIL: I don't see it -- but we have a
8 non-statutory, non-final action that is fairly squarely on
9 all fours with Apter, and we can also make a claim under the
10 final agency action.

11 THE COURT: Okay.

12 MS. DOKUPIL: Yeah, because Apter defines an agency
13 rule very broadly to include even any statement an agency
14 might make. Even a social media post can be an action.

15 Agency rules fall into two categories, substantive
16 and non-substantive. So if it is a substantive rule, it
17 really needed to go through notice and comment. And no one
18 is arguing that what we are challenging went through notice
19 and comment.

20 So for the sake of argument, hypothetically if we
21 argue that they are not substantive rules, then there can
22 still be a claim because a non-final agency action is still
23 an agency action.

24 Here, we are alleging that the Defendants are
25 making recommendations to private companies about using

1 technologies to downgrade American media companies they
2 believe as risky.

3 And very similarly to how the FDA took to social
4 media to say that certain medical treatments are too risky
5 and people who talk about them in a different way should not
6 be doing so, and that Plaintiffs have been adversely
7 affected.

8 So we have many examples in the complaint and the
9 motion for preliminary injunction about -- with public
10 statements by Defendants to say that their goal was to stop
11 advertising revenue from going to disfavored media outlets.
12 And my co-counsel will talk more about that.

13 But the most damning one I think is the founders of
14 GDI stating that their goal is to steer ad dollars away from
15 disfavored media and toward quality journalism.

16 And they are excited about the fact that over a
17 dozen ad tech companies covering 20 media markets used GDI's
18 technology, and they cut the number of ad options in half.

19 So it is very clear that the recipients of State
20 Department funding had a viewpoint that they were promoting
21 in the media.

22 Another item that I find fairly damning is that
23 they funded a training program for American teachers on media
24 literacy, which ultimately instructed teachers to install
25 NewsGuard, which is one of the technologies that has directly

1 harmed the Media Plaintiffs.

2 So we have a number of funding decisions being made
3 and a number of statements made that are clearly aimed at
4 cutting the influence of disfavored media outlets.

5 And as Apter says: For purposes of determining
6 non-final agency action, we do not see any daylight between
7 an agency that uses imperative language in recommending a
8 course of action and an agency that uses imperative language
9 in prescribing a policy.

10 And this zone of interest test, as I mentioned
11 before, there is a couple of statutes, but it is not very
12 demanding. All the Plaintiff has to do is bring claims that
13 are arguably within the zone of interest.

14 So moving on to the final agency action claim. The
15 Court doesn't need to reach this, of course, if it believes
16 that the Plaintiffs have asserted a claim based on a
17 non-final agency action.

18 But the Apter court did not believe that mere
19 tweets rose to the level of a final agency action. But here
20 we have more than that. Here we have grants. And the
21 decision to approve a grant is a final agency action.

22 And People for the Ethical Treatment of Animals vs.
23 Tabak from the District of Maryland in 2023, it says that: A
24 grant is the consummation of the agency's decision-making
25 process that is of sufficient legal consequence to make the

1 action final under the APA.

2 And the Plaintiffs have detailed a number of
3 decisions for establishment of initiatives, any one of which
4 could be considered a final agency action.

5 Apter notes the test for whether an agency action
6 is final is whether it marks the consummation of the agency's
7 decision process and determines rights and obligations from
8 which legal consequences flow.

9 And, here, the grants and public statements
10 encouraging companies to talk to the State-Department-funded
11 entities for technology to combat disinformation are clearly
12 the consummation of a decision process that reflects agency
13 policy. And so this prong is met.

14 But the second prong is a little more complicated.
15 The test is whether the agency's action is binding on itself.
16 In other words, has the agency dictated a legal position?

17 And we would argue that it has. The agency has
18 made public statements, sometimes through its grantees, about
19 the importance of combating disinformation both abroad and
20 domestically.

21 It is made clear that the media companies should
22 adopt its favorite technology to suppress this speech of
23 disfavored viewpoints.

24 And the actions are implicitly taking the position
25 that certain speech by certain American media outlets is not

1 entitled to First Amendment protection.

2 So in Texas/EEOC, the Court said that the agency
3 action is binding once the program has been adopted and the
4 agency has committed itself to a particular position.

5 Further, in Texas vs. U.S., that is the DAPA case:
6 The final agency action is defined as substantive when it
7 doesn't give the agency any discretion to change the
8 initiative and grants funded and deployed.

9 And this is why it makes sense to consider a grant
10 to -- final action because, generally, once you issue a
11 grant, it is done for the duration of the grant period.

12 And, further, the mere possibility that an agency
13 might reconsider its advisory in light of informal discussion
14 or invited contentions of inaccuracy, it doesn't suffice to
15 make an otherwise final agency action non-final. So just
16 because the agency could take it back doesn't definalize it.

17 So if there a final agency action, then Plaintiffs
18 have alleged facts to establish this Court's jurisdiction
19 over a claim based on that action.

20 Defendants have raised in their motion to dismiss
21 that there was no final agency action, but they haven't
22 argued that in the alternative if there is a final agency
23 action, that it was unreviewable or committed to agency
24 action or non-substantive.

25 But definitely the Plaintiffs would argue that if

1 there is a final agency action and it did not go through
2 notice and comment, then it was arbitrary and capricious
3 because it didn't consider the relevant costs. It didn't do
4 a sufficiently reasoned analysis for wanting the grants. It
5 didn't consider more limited options. And it didn't take
6 into account the reliance interests.

7 But it is probably premature to explore all of
8 those different paths, forks in the road, flow charts at this
9 time.

10 THE COURT: Okay.

11 MS. DOKUPIL: If Your Honor has no further
12 questions, I will turn it over to my co-counsel.

13 THE COURT: Okay. Thank you.

14 MS. DOKUPIL: Okay.

15 MS. LITTLE: I'm Margaret Little representing Daily
16 Wire and the FDRLST Media.

17 On the question of how the Court should proceed, I
18 would agree that my co-counsel that the motion to transfer
19 should be decided first and largely because the motion to
20 dismiss is just poorly based, and this should be the Court
21 who decides it, so -- but I think the Court would be free to
22 change that order as well.

23 THE COURT: Okay.

24 MS. LITTLE: And so that is our position.

25 I will be brief on the motion to transfer venue

1 because co-counsel has handled it quite ably.

2 We do have an independent ground for finding venue
3 proper here, the substantial part of the events or admissions
4 have occurred in this venue, and it does not have to be the
5 best venue and the venue where the most relevant acts took
6 place. It only has to have a substantial connection.

7 Also, the Court may consider the location of the
8 efforts -- the effects, rather, the effects of the alleged
9 conduct.

10 And, for example, here in Texas there was a report
11 prepared by the GDI Labs at the University of Texas that
12 listed in its, I think page 18 of our complaint, it lists the
13 10 worst media and the 10 best media. And that is clearly --

14 THE COURT: And that happened in Texas?

15 MR. MODY: It happened in Texas at the University
16 of Texas at Austin but was distributed throughout the state,
17 throughout the University of Texas system, and to the
18 citizens of the State of Texas. And those interests are
19 harmed in Tyler just as much as they are in Austin.

20 So, in addition, Daily Wire is a Texas LLP, and
21 both The Federalist and Daily Wire have multiple paid
22 subscribers within the Tyler Division. They have reported on
23 things that would be of interest to people in the State of
24 Texas. And to the extent that the Defendants' actions have
25 downgraded, discredited, or defunded their ability to

1 distribute their news media reporting in this district, we
2 think the Court easily can find jurisdiction.

3 We cited to the Court a case called Diesel Power,
4 which addresses the questions of what happens when the
5 conduct that is complained of in the complaint occurs on the
6 Internet.

7 And there the Court held that the venue where the
8 harm occurred where the interests were damaged was proper.

9 We also think the statute, 1391(b)(2) was amended
10 to allow people to sue the Government where these events -- a
11 substantial part of the events took place.

12 And, in fact, when Congress amended that statute,
13 one of the reasons given was that Congress was incensed that
14 Americans would have to sue in DC in order to hold the public
15 officials there accountable.

16 So we think it is contrary to that purpose of the
17 amendment of the statute and that venue is easily established
18 here.

19 And, finally, I would say my able co-counsel has
20 argued the point of pendent venue, and that would be an
21 independent reason to keep the case here.

22 THE COURT: Okay.

23 MS. LITTLE: Turning to the issues raised by the
24 motion to dismiss. We think there are very, very substantial
25 allegations in the complaint that show ongoing, current, and

1 likely future harm that would be addressed by an injunction.

2 Those include the Media Literacy Now campaign which
3 negatively impacts the Media Plaintiff -- Plaintiffs.

4 The Ad Fontes tool that is being promoted by the
5 State Department was shown to over 700 teachers in Germany
6 pursuant to a State Department grant. Many of those were
7 American teachers who were instructed to use a Data Detox Kit
8 which recommends that students install NewsGuard which lowers
9 circulation.

10 In the briefing on the motion to dismiss, counsel
11 for the State Department suggested that -- or at least in the
12 argument -- sorry -- he suggested there was no compelled
13 speech here. And I want to expand on that a little bit.

14 Because what happens when you install NewsGuard on
15 a school computer or a library computer is you get this
16 little stamp that says this is a 12.5 rating. We don't think
17 these people are telling the truth.

18 When the Government does that, when it devotes
19 resources to blacklisting and labeling American news media as
20 unreliable, there is a compelled speech issue there because
21 that thing pops up on the student's computer or the library
22 computer, and it is self-incriminating.

23 Neither of my clients, Daily Wire or Federalist
24 wants to publish their material to have a stamp of Government
25 disapproval put on it when that stamp has been promoted,

1 developed, et cetera, by the Federal Government and in some
2 cases financed by the Federal Government.

3 So we think that there is obvious harm here. This
4 is also a very developing story. Counsel for State
5 Department likes to make a point of the fact that Media
6 Literacy Now campaign was not alleged in the complaint.

7 Well, that is just evidence of what is going on,
8 and that story did not break until long after the complaint
9 was filed.

10 That is also a very good indication of why we need
11 expedited discovery because this is an ongoing problem. It
12 arose -- or at least a lot of it arose during COVID, and a
13 lot of attention was paid to misinformation, disinformation,
14 or what was called that. And the Government's power was used
15 very recklessly, I would say, in that situation. And nothing
16 in the laws permits the Government to devote resources and
17 divert resources to the suppression of American news media.

18 That violates any number of constitutional rights,
19 the First Amendment right, which was articulated in Grosjean.
20 That case says that the Government may not discredit media.

21 And then in the -- oh, gosh, the second case is
22 eluding me right now, but what it says is it can't interfere
23 with the finances or financially harm American news media.

24 Those are very important points here, and what has
25 happened is these NewsGuard, for example, loves to brag about

1 the fact that millions of advertising dollars are directed
2 away from these platforms.

3 Well, I think the idea that there is no harm or no
4 ongoing harm is fairly inconsistent with those statements
5 made by the very platforms that are working with the State
6 Department to discredit the media.

7 So there is definitely a lot of disputed facts
8 here. We think that the submissions that were made by the
9 State Department in connection with their motion to dismiss
10 just are not -- cannot be squared with what the evidentiary
11 record is here.

12 They are also very carefully crafted. They talk a
13 lot about foreign disinformation, but they don't say they
14 haven't, in fact, attacked domestic news media. They are
15 very carefully crafted to not actually say that. And the
16 reason is because that they essentially admit they have done
17 that in the past. They allege this is old news.

18 I think it is just more evidence that we need to
19 know what happened and get to the bottom of this and to the
20 truth of the story.

21 So there is definitely injury here. There is
22 definitely traceability. You can follow the injury to the
23 Plaintiffs back to the State Department very directly, much
24 more directly, in fact, than in Missouri v. Biden.

25 Because once the State Department says use

1 NewsGuard or it provides funding for that, there is immediate
2 harm because what pops up is that stamp of disapproval.

3 Whereas, in Missouri vs. Biden you had an
4 intermediary -- intermediary -- excuse me -- a social media
5 intermediary that had to be, you know, asked, maybe coerced
6 to engage in a censorship.

7 Here, there is no intermediary here. We think it
8 is much more direct.

9 And so by their own admissions the Media
10 Plaintiffs -- rather, the Defendants have set out a very
11 disturbing campaign.

12 I think it is also important to bring your
13 attention to the Office of Inspector General reports for 2020
14 and 2022, which shockingly show that something like 70
15 percent of the Global Engagement Center's personnel is
16 private sector. And they admonish -- this is the Inspector
17 General -- admonishes the State Department for having no
18 controls over them, for allowing them to perform essentially
19 governmental functions, no accountability, no reporting.
20 These are very disturbing allegations, and they are not what
21 we put --

22 THE COURT: One of the questions that I had reading
23 your complaint is whether there is any way that the State
24 Department could ever engage in this kind of conduct and try
25 to really limit it to technologies that would apply only to

1 foreign propaganda without it, as I mentioned earlier,
2 without it washing back on or filtering back down to domestic
3 speakers.

4 What is your position on that?

5 MS. LITTLE: Yes, there is. This is redressable.
6 We can craft an injunction that would allow the State
7 Department to continue to use tools and technology to work
8 with and counter foreign disinformation without affecting
9 domestic news media.

10 And that is not just our opinion. That is the
11 opinion of Congress, which made it very clear an explicit
12 limitation on the powers of the Global Engagement Center,
13 that nothing in there was to permit them to do anything other
14 than counter foreign disinformation. And so it is not just
15 our opinion, it is Congress's command that they do so.

16 THE COURT: Okay.

17 MS. LITTLE: I think my co-counsel very ably
18 addressed the redressability issues and the traceability. I
19 guess one thing on traceability that I would like to
20 emphasize, and give me a moment and I will find what I
21 want -- it is a very low standard right now on traceability.
22 We just have to show that there is evidence that this was
23 connected to the activities of the Defendant, but there is no
24 requirement that the harm be actualized at this stage. That
25 is to be developed in discovery.

1 So we think that the motion to dismiss is -- under
2 12(b)(1) is improper, and should not be granted.

3 THE COURT: Okay. Okay.

4 MS. LITTLE: Thank you.

5 THE COURT: Thank you.

6 Mr. Mody, I will give you a few minutes for
7 rebuttal, and then we can move on to the discovery, expedited
8 discovery issues.

9 MR. MODY: Thank you, Your Honor, I appreciate
10 that.

11 I just wanted to address a few points that our
12 friends on the other side made.

13 They brought up the Missouri litigation, I think a
14 number of times. I just wanted to make a few points about
15 that.

16 The first is, that case was pretty different than
17 this case in terms of the breadth of the allegations there
18 and the number of defendants, and that case was primarily
19 about direct communications between the Executive Branch and
20 the social media platforms.

21 But I do just want to point out that the Fifth
22 Circuit specifically carved out the State Department from its
23 injunction. The Fifth Circuit found that State Department's
24 contacts with the social media platforms was solely about
25 learning how technology worked. It wasn't about asking the

1 social media platforms to take anything down.

2 And the Fifth Circuit found that even after months
3 and months of discovery in that case, that there was nothing
4 to enjoin with respect to the State Department.

5 And so with respect to the Defendants here and how
6 Missouri may or may not play into that, I just wanted to
7 emphasize that.

8 We also think that, you know, to the extent that
9 Your Honor is inclined to disagree with us on our motion to
10 dismiss, the Supreme Court is almost certainly going to have
11 to address the standing issues in Missouri vs. Biden. And
12 our -- excuse me, Murphy vs. Missouri before the Supreme
13 Court.

14 And so, you know, we do think that there would be
15 grounds to at least wait for some clarification about the
16 appropriate standing standard. We don't think the Court
17 needs to wait to decide the motion, but we think that would
18 be an option.

19 THE COURT: Okay.

20 MR. MODY: With respect to Texas's standing, again,
21 I think the cases that Texas is citing, that is the EEOC case
22 and then the United States vs. Texas, I think that is the
23 DAPA case, and these involve direct conflict between federal
24 regulation or federal guidance and state law.

25 In EEOC, it was the EEOC guidance that directly

1 injured Texas as a state because it was impossible for Texas
2 to continue its ongoing policies and comply with federal law.

3 In DAPA there was a direct economic injury that was
4 found to the state as a result of the state being required to
5 provide driver's licenses.

6 I had a quick moment to review the NRC case that
7 Your Honor cited, and I think there the key point that I
8 would emphasize that it seems like there was a county that
9 wanted to specifically apply for a place to store nuclear
10 waste. And there, essentially, the NRC issuing its license
11 was the but-for cause for them being able to store its waste
12 or not being able to store its waste.

13 And, of course, if it was able to store its waste,
14 then that would have directly conflicted with the HB 7, the
15 state law in that case.

16 And so, again, I am not sure where the exact line
17 is. Your Honor, we were talking about coercion versus just
18 encouragement. But we think that this case just falls far on
19 the side of there is no direct encouragement. There is no
20 inducement, I guess I would say. There is no incentive,
21 positive incentive to the platforms. There is no negative
22 incentive. No coercion. Nothing kind of suggesting that the
23 Federal Government is going to penalize them.

24 The platforms are not required to make a choice
25 between doing something that the Federal Government is

1 telling them to do and complying with the state law.

2 And so we don't think that there is -- it meets the
3 kind of injury to the state sovereign interest there.

4 You asked about the GEC work, sort of how they
5 ensure that it is targeted for overseas. And something I
6 should have mentioned, it's in the Kimmage declaration and
7 also in the NewsGuard declaration is, you know, the grantees
8 sign statements of work that kind of set out requirements
9 that say that that work is targeted overseas so they are able
10 to ensure this, at least with the grantees contractually.

11 And I think Your Honor asked this question about
12 ensuring that the technology itself only has one purpose.
13 And I think we make this point in our motion to dismiss reply
14 by -- you know, a lot of this technology it is -- depending
15 on what language, for instance, the technology is being used
16 to analyze, you know, it has multiple uses, and we think that
17 it is within the State Department's ability to assess or
18 develop technologies that have uses in terms of fighting
19 foreign disinformation.

20 It doesn't mean that that technology can never be
21 used in a context that would apply to domestic media, but we
22 don't think that that, you know, violates any law because we
23 don't think that any of that is sort of traceable back to --
24 traceable back to Defendants, and we think that --

25 THE COURT: Well, it sounds like Plaintiffs'

1 counsel agrees with you on that point.

2 MR. MODY: Yeah, I just wanted to --

3 THE COURT: Yeah.

4 MR. MODY: -- wanted to emphasize that.

5 There was a little bit of talk of the Media
6 Literacy Now allegations. These were the allegations that
7 are in the opposition to the motion to dismiss.

8 Of course, you know, our position would be that it
9 is not in the complaint, and they would need to amend the
10 complaint for you to consider those allegations. But I guess
11 just one point I want to highlight is that there is no
12 connection to the platforms or the advertisers that are the
13 source of -- the alleged source of injury to media
14 Plaintiffs.

15 I mean, their entire theory of injury is this sort
16 of demonetization through the advertisers or social media
17 platforms taking certain decisions.

18 There is no connection that is drawn between a
19 presentation to teachers and the injuries that they are
20 claiming in their complaint. And we think that in and of
21 itself is fatal to that allegation.

22 We've made certain traceability arguments in our
23 papers, and then we don't think there is anything to enjoin
24 with respect to the Media Literacy Now project. That was a
25 grant -- that was a presentation that -- that was a program I

1 think in 2021 or 2022. There is no ongoing connection there.
2 There is no conduct that this Court could enjoin that would
3 redress any of these injuries.

4 On the APA and ultra vires claim, I just want to
5 clarify that, you know, the complaint pleads the APA claim I
6 think Count 4 separate from the ultra vires claims, and --
7 or, finally, just the action argument is about Count 4 of the
8 complaint there. So I just wanted to respond to that.

9 THE COURT: Okay.

10 MR. MODY: And then the final point I wanted to
11 make with respect to the substantial part of the events test
12 under venue, I think that the Media Plaintiffs' argument
13 comes down to the fact that they have readers here. I know
14 they talked about the report that was put out by UT, but I
15 believe that is outside this district. I don't think that is
16 in the Eastern District of Texas.

17 But, in any event, I think they are basically left
18 with the argument that Media Plaintiffs and the Federalists
19 have readers in the Eastern District of Texas. I think that
20 argument would basically -- I mean, if that were true, if
21 that were sufficient to establish venue, that would mean that
22 venue is proper everywhere.

23 And we just don't think that can be consistent with
24 the purpose of the venue statute. We don't think that that
25 is a reasonable reading of substantial part of the events for

1 a news organization that has readers presumably throughout
2 the country to say that venue would be proper in every single
3 district in the country.

4 THE COURT: Okay. Thank you.

5 MR. MODY: Thank you, Your Honor.

6 THE COURT: Now, I would like to hear from
7 Plaintiffs on the motion for expedited discovery and
8 specifically what exactly it is that you are seeking.

9 I know the motion repeatedly says it is limited and
10 narrowly focused, but I don't know what it is. Do you have
11 discovery prepared that you could submit to the Court and let
12 me evaluate it?

13 MS. LITTLE: Yes, Your Honor. It is probably not
14 quite final, but we could get it to you within a very short
15 period of time. We have been working hard to focus it and
16 make it just what we said it would be --

17 THE COURT: Okay.

18 MS. LITTLE: -- which is focused on the narrow
19 issues that are -- address the claims raised by the
20 Government. We think we can get those out probably I would
21 say within a week.

22 THE COURT: Okay.

23 MS. LITTLE: The other thing, I do want to address
24 a couple of things that were said on rebuttal on
25 redressability and the Media Literacy Project.

1 If you go on to the website and you watch those
2 presentations that will go to American teachers asking them
3 to do things like the Data Detox Kit and the -- to install
4 NewsGuard, the State Department's seal is right on the first
5 slide of every one of those presentations. That is the
6 Government's seal that this is a good idea for school
7 children and people in libraries to install this technology.

8 That can be -- that makes it both traceable and
9 very redressable. Those things should be taken down. And we
10 have a multitude of things in our complaint that are still up
11 on live sites that can be taken down. And so this injury is
12 indeed very redressable.

13 THE COURT: Okay. Now back to the discovery, so
14 what would your time table be? I think somewhere I recalled
15 a couple of months and then a whole-day hearing on the
16 preliminary motion -- or preliminary injunction motion in
17 June. Is that --

18 MS. LITTLE: I think because this went out a little
19 bit further, maybe midsummer is more realistic.

20 THE COURT: Okay. Well, when you submit whatever
21 the proposed discovery that you are looking for the
22 preliminary injunction motion, if you could include your
23 proposed time table, that would be helpful.

24 MS. LITTLE: Absolutely. And we have that prepared
25 and we are going to foreshorten the normal time period so

1 that can be done quickly.

2 THE COURT: And, obviously, if Defendants want to
3 respond to that notice, that is fine. I am not going to take
4 up issues on scope of discovery. We are not going to fight
5 about discovery. But I just want to know what specifically
6 it is in Plaintiffs' dream world that they would be able to
7 get during this expedited discovery period in evaluating
8 their motion.

9 MS. LITTLE: Well, just to give you a heads up, it
10 very much tracks what we would seek by way of injunctive
11 relief. So these are the things that can be fixed now --

12 THE COURT: Okay.

13 MS. LITTLE: -- and stopped now.

14 THE COURT: Okay.

15 Okay.

16 MS. LITTLE: Thank you.

17 THE COURT: Mr. Mody, do you or anyone else want to
18 respond on that point?

19 MS. CANEVARI: Sure, Your Honor. This is Dorothy
20 Canevari on behalf of the Defendants.

21 Just at the outset, did you say that when
22 Plaintiffs submit their proposed discovery, that the
23 Defendants would have an opportunity to respond to the scope?

24 THE COURT: Yes.

25 MS. CANEVARI: Okay.

1 THE COURT: Then I said I am not looking for a
2 motion to quash or anything like that. If you want to
3 respond to the point that this is way too broad, it should be
4 more narrowly limited, that sort of thing in relation to
5 their motion, the Plaintiffs' motion for expedited discovery,
6 I would consider that.

7 MS. CANEVARI: Okay.

8 THE COURT: Okay.

9 MS. CANEVARI: Understood.

10 Just a few points.

11 First, it is Defendants' position that expedited
12 discovery before the motion to dismiss is decided would be
13 improper, as the Court needs to ensure itself of jurisdiction
14 before turning to expedited discovery.

15 If Defendants are given an opportunity to respond
16 to Plaintiffs' proposed interrogatories and requests for
17 production, I won't get into that now, but it is our position
18 that the scope of these requests are overbroad as for the
19 broad categories of information that Plaintiff has sought
20 expedited discovery on.

21 They are seeking things that are about conduct that
22 is years in the past and that are on a platform that is no
23 longer operational. And those things are necessarily
24 overbroad to their motion for preliminary injunction.

25 And courts have found that expedited discovery is

1 improper when the information that a plaintiff seeks is not
2 necessary to their motion for preliminary injunction.

3 And, here, the Plaintiffs have said in their motion
4 for expedited discovery that they have sufficient open source
5 evidence to maintain their preliminary injunction motion. So
6 we would say that the requests that Plaintiffs have at the
7 outset cannot be necessary if they believe that their motion
8 for preliminary injunction is sufficient at that stage.

9 THE COURT: Okay. I mean, it sounds like the harm,
10 if there is any harm to Defendants, would be pretty minimal
11 given that at that point merits discovery would begin anyway,
12 assuming the Court denies the motion to dismiss and the
13 motion to transfer.

14 MS. CANEVARI: If the Court were to deny the motion
15 to dismiss and the motion to transfer, yes, so we would have
16 to, like, discuss with our client about the scope of
17 discovery.

18 And this case does present an APA claim, so we
19 would have to discuss with the agency whether an
20 administrative record would be the appropriate avenue here or
21 what discovery would look like.

22 But, again, for the burden on Defendants -- I mean,
23 the scope of the information that Plaintiffs seem to suggest
24 that they need is really broad, and it would be something
25 that could take months to decide and could result in a burden

1 on Defendants.

2 THE COURT: Okay.

3 Okay. Thank you.

4 MS. CANEVARI: Thank you, Your Honor.

5 THE COURT: Anything else from Plaintiffs on their
6 motion for expedited discovery?

7 MS. LITTLE: No.

8 THE COURT: Okay.

9 Okay. Anything further from either side on any of
10 the issues today?

11 I think I have everyone's arguments. The briefing
12 was very good, and I have tried to be as prepared as possible
13 today, but it always helps me to hear from you all who know
14 the case so well in thinking through these kind of difficult
15 issues.

16 And I appreciate the good arguments today and the
17 careful responses. So I will take those motions under
18 advisement.

19 And unless there is anything further, we are
20 adjourned.

21 (Hearing adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shea Sloan
SHEA SLOAN, CSR, RPR
FEDERAL OFFICIAL COURT REPORTER

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